

MV 97-11

Tax Type: MOTOR VEHICLE USE TAX

Issue: Rolling Stock (Vehicle Used Interstate For Hire)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	Case No.
)	IBT No.
v.)	
)	Administrative Law Judge
DAVIDSMEYER BUS SERVICE INC.)	Mary Gilhooly Japlon
Taxpayer)	

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Richard A. Rohner, on behalf of the Department of Revenue of the State of Illinois; Collins & Collins, by Michael R. Collins, on behalf of Davidsmeyer Bus Service, Inc.

SYNOPSIS:

This matter comes on for hearing pursuant to the timely protest by Davidsmeyer Bus Service, Inc. (hereinafter "Davidsmeyer" or "taxpayer") of Notice of Tax Liability ("NTL") No. SF 199328785401006 issued by the Department of Revenue (hereinafter "Department") on October 15, 1993 in the amount of \$486,446.00 for Use Tax, penalty and interest due on the purchase of buses, bus parts, consumable supplies and fixed assets for the period of July 1, 1981 through December 31, 1992. The taxpayer filed a timely protest thereto.

At hearing, Mr. Richard D. Bingham testified on behalf of the taxpayer, and Ms. Gerise Ricard testified as an adverse witness for Davidsmeyer. Specifically at issue is whether the taxpayer is entitled to the "rolling stock" exemption of the Use Tax Act on its purchases of buses and repair parts for the buses, whether the Department properly assessed the taxpayer on its bus

repairs and maintenance, consumable supplies and fixed assets, and whether the assessment is barred by the statute of limitations for the period prior to June 30, 1990. The parties filed a Stipulations of Facts and Issues (Joint Ex. No. 1). Subsequent to the hearing, they filed memoranda of law in support of their respective positions.

Following the submission of all evidence and a review of the record and briefs filed herein, it is recommended that this matter be resolved in favor of the Department of Revenue.

FINDINGS OF FACT:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Correction of Returns, showing a total liability due and owing in the amount of \$230,132 for state Use Tax delinquencies, and penalty in the amount of \$65,467, for a total of \$295,599 for the period of July 1, 1981 through December 31, 1992. (Dept. Group Ex. No. 1; Tr. pp. 6-7).

2. On October 15, 1993 the Department issued Notice of Tax Liability No. SF 199328785401006 to the taxpayer. (Joint Ex. No. 1, par. 2, Ex. 2).

3. The tax liability period is July 1, 1981 through December 31, 1992. (Joint Ex. No. 1, par. 4, Ex. 2).

4. On December 6, 1993, the taxpayer filed a timely protest to the Notice of Tax Liability. (Joint Ex. No. 1, par. 3).

5. A Certificate of Public Convenience and Necessity was issued to the taxpayer by the Interstate Commerce Commission on May 11, 1984. (Joint Ex. No. 1, par. 1, Ex. 1).

6. The certificate authorized Davidsmeyer to transport passengers by bus in interstate commerce. (Joint Ex. No. 1, par. 1).

7. The taxpayer takes passengers to airports, and picks up passengers from airports. (Tr. p. 19).

8. The taxpayer documents its trips, both out of state and to and from airports, with trip tickets. (Tr. pp. 20-21).

9. The trip tickets also serve as invoices. (Tr. p. 23).

10. Charter trips conducted for school groups are also documented and invoiced via trip tickets. (Tr. p. 26).

11. The taxpayer advertised its services from 1988 until last year through a brochure stating that it is available for daily route services for school systems and intrastate and interstate charters. (Tr. pp. 29-31; Taxpayer's Ex. No. 1).

12. The taxpayer has a contract to provide daily route service with school district 59, and another contract to service a consolidated special education district. (Tr. p. 50).

13. Davidsmeyer maintains its own repair shop facility. (Tr. p. 37).

14. During the audit period, the taxpayer purchased parts in order to repair its own buses; it does not resell any of those parts to any outside parties. (Tr. p. 37).

15. If the parts purchased by the taxpayer are not used right away, they are put into inventory for later use. (Tr. p. 37).

16. Due to a flash flood on August 14, 1987, some of the taxpayer's business records were destroyed. (Tr. pp. 38-39; Joint Ex. No. 1, pars. 15, 16; Ex. Nos. 11, 12, 13).

17. As a result of the flooding and the destruction of certain records, the taxpayer was not able to produce invoices for consumable supplies, fixed assets and bus repairs and maintenance for the period prior to August 14, 1987. (Tr. p. 41; Joint Ex. No. 1, pars. 14, 15, Ex. 11).

18. Buses utilized for school routes are also used on charter trips, including out of state trips. (Tr. p. 44).

19. Prior to 1984, Davidsmeyer did not claim the rolling stock exemption on its purchases of buses and parts because it did not have a certificate of authority from the Interstate Commerce Commission. (Tr. pp. 44-45).

20. During the course of the revised audit, the Department did not investigate whether the retailer from whom Davidsmeyer purchased consumable supplies and fixed assets filed Use Tax returns. (Tr. p. 70; Joint Ex. No. 1, par. 13).

21. There were no invoices for purchases of bus parts for the period of 1981 through 1984, so the auditor took a sample of bus part purchases for the period of January 1990 through June 1990 and projected purchases for 1981 through 1992 based upon the sample. (Tr. pp. 65-66; Joint Ex. No. 1, par. 18(b)).

22. The taxpayer verbally agreed to the size of the sample. (Joint Ex. No. 1, par. 18(b)).

23. Regarding bus repairs and maintenance, the Department used the year 1990 to project liability for audit period. (Joint Ex. No. 1, par. 18(c)).

24. The year 1990 was chosen for the sample because the only other years for which information was available were 1991 and 1992. In 1990, repair expenses were less, and the least amount of expenses incurred in this period. (Joint Ex. No. 1, par. 18(c)).

25. During the period of July 1, 1990 through December 31, 1990, the taxpayer owned 118 buses. (Joint Ex. No. 1, par. 19).

26. During the period of July 1, 1991 through December 31, 1991, the taxpayer owned 118 buses. (Joint Ex. No. 1, par. 20).

27. During the period of July 1, 1992 through December 31, 1992, the taxpayer owned 118 buses. (Joint Ex. No. 1, par. 21).

28. Exhibit 4 to the stipulation consists of copies of trip tickets for the taxpayer's transportation of passengers across state lines, or destined across state lines for the period of January 1, 1990 through December 31, 1992 for the bus numbers depicted thereon. (Joint Ex. No. 1, par. 7, Ex. No. 4).

29. Exhibit 5 to the stipulation is a summary by bus of the trip tickets reflected in stipulation Ex. 4, with the exception of the unidentified buses at the bottom of page 14. (Joint Ex. No. 1, par. 8, Ex. No. 5).

30. Exhibit 6 to the stipulation identifies all but one of the unidentified buses on page 14 of Exhibit 5 to the stipulation. (Joint Ex. No. 1, par. 9, Ex. 6).

CONCLUSIONS OF LAW:

The Department prepared corrected returns for Use Tax liability pursuant to section 5 of the Retailers' Occupation Tax (hereinafter ROT) Act (35 ILCS 120/5). Said section is incorporated by reference in the Use Tax Act via section 12 thereof (35 ILCS 105/12). Section 5 of the ROT Act provides in pertinent part as follows:

In case any person engaged in the business of selling tangible personal property at retail fails to file a return, the Department shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination. ... Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy or computer print-out of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. ... Such certified reproduced copy or certified computer print-out shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein. (35 ILCS 120/5).

In the case at bar, the taxpayer is challenging the assessment by the Department of Use Tax, penalty and interest on the purchase of buses, repair parts for buses, fixed assets and consumable supplies. The taxpayer asserts that the bus and repair part purchases are exempt from Use Tax based upon the "rolling stock exemption" as set forth in sections 3-55 and 3-60 of the Use Tax Act as follows:

Sec. 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances:

(b) The use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce... . (35 ILCS 105/3-55).

Sec. 3-60. Rolling stock exemption. The rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports for hire, persons whose journeys or property whose shipments originate or terminate outside Illinois. (35 ILCS 105/3-60).

To be considered an interstate carrier for hire, the taxpayer must either possess an Interstate Commerce Commission Certificate of Authority, an Illinois Commerce Commission Certificate of Authority, or be a carrier recognized by the Illinois Commerce Commission. (*See*, 86 Ill. Admin. Code ch. I, Sec. 130.340). In the instant case, the parties stipulated and provided evidentiary proof that the taxpayer received a grant of authority from the Interstate Commerce Commission to operate as an interstate carrier of passengers for hire in May 11, 1984. (Joint Ex. No. 1, par. 1, Ex. 1). Prior to said date, the taxpayer claims that it operated interstate, but paid tax on any purchases of buses and repair parts.

Regarding the requirement that the interstate carriers must be "for hire", the administrative rules provide that "[t]he term 'rolling stock' includes the transportation vehicles of any kind of interstate transportation company for hire (... bus line, ...)", but the exemption does not contemplate vehicles:

used by a person to transport its officers, employees, customers or others not for hire (even if they cross State lines) or to transport property which such person owns or is selling and delivering to customers (even if such transportation crosses State lines). 86 Ill. Admin. Code ch. I, Sec. 130.340(b).

In sum, the taxpayer must prove by documentary evidence that it is an interstate carrier for hire using rolling stock that transports persons or property moving in interstate commerce. The Certificate of Public Convenience and Necessity which was issued to the taxpayer by the Interstate Commerce Commission on May 11, 1984 is by itself not sufficient to prove that Davidsmeyer is an interstate carrier for hire. In First National Leasing & Financial Corporation v. Zagel, 80 Ill.App.3d 358, 360 (4th Dist. 1980), the Court specifically held that "... the certificate of temporary authority, by itself, is insufficient evidence of interstate activity." In the

case at bar, there was testimony regarding the taxpayer's adherence to the rules and regulations of the Interstate Commerce Commission. However, as the testimony in First National Leasing & Financial Corporation, *id.*, was not sufficient to prove interstate activity, testimony by the taxpayer's witness, likewise, is not adequate to establish that the taxpayer is an interstate carrier for hire. Rather, documentary evidence in the form of books and records is necessary.

I will consider the trip tickets tendered by the taxpayer as part of the stipulation exhibits as adequate substantiation of taxpayer's claim that it is an interstate carrier for hire, as the information thereon supports this assertion. However, the trip tickets in evidence as stipulation exhibit 4 pertain only to the years 1990, 1991 and 1992. There is no documentary evidence regarding the prior years of the audit period. As the taxpayer was granted authority to operate as an interstate carrier for hire by the Interstate Commerce Commission in May 1984, there is no evidence whatsoever for the period prior thereto. As the trip tickets for 1993 and 1994 (stipulation exhibits 8 and 9) are outside the audit period, they carry no probative value. The holding in Chicago and Illinois Midland Railway Company v. Department of Revenue, 66 Ill.App.3d 397 (1st Dist. 1978) is pertinent to this matter. The Court held in that case that in order for the rolling stock exemption to apply, the interstate use of the rolling stock must have occurred during the audit period.

Therefore, the taxpayer has not even established that it was an interstate carrier for hire for the taxable years 1984 through 1989. (Note, however, that as the taxpayer did not have a certificate of authority from the Interstate Commerce Commission, it asserts it did not claim the exemption for the period prior to 1984). However, for the sake of argument, I will assume that the taxpayer has satisfied this requisite. The taxpayer must next prove that the vehicles at issue are used as rolling stock moving in interstate commerce. That is, the taxpayer must show with competent evidence that its rolling stock (i.e., vehicles) transports, for hire, "persons whose journeys or property whose shipments originate or terminate outside Illinois" and therefore,

qualifies for the rolling stock exemption.¹ Furthermore, as both buses and repair parts are at issue herein, the taxpayer must also prove that the parts it purchased were incorporated into rolling stock that moved in interstate commerce.

Several questions arise, such as (1) what types of trips constitute interstate commerce and qualify for the rolling stock exemption; and (2) how much interstate movement is necessary for an otherwise qualifying taxpayer to be entitled to the exemption. The regulations pertaining to the statutes at issue do not directly address these questions, but do shed some light on the issues. 86 Ill. Admin. Code ch. I, Sec. 130.340 provides in relevant part as follows:

(c) The rolling stock exemption cannot be claimed by a purely intrastate carrier for hire as to any tangible personal property which it purchases because it does not meet the statutory tests of being an interstate carrier for hire.

(d) The exemption applies to vehicles used by an interstate carrier for hire, even just between points in Illinois, in transporting, for hire, persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. The exemption cannot be claimed for an interstate carrier's use of vehicles solely between points in Illinois where the journeys of the passengers or the shipments of property neither originate nor terminate outside Illinois.

It is important to note that there is a distinction between a vehicle traveling interstate, or across the state line, and "rolling stock moving in interstate commerce". The exemption is accorded to stock, carrying persons or property, the journeys of which originate or terminate outside Illinois. A state can tax the instrumentalities of interstate commerce, as long as two conditions are met: (1) an obvious nexus exists between the taxing state and the object(s) taxed; and (2) the tax is fairly apportioned, so that there is no unreasonable taxation. (First National Leasing & Financial Corp. v. Zagel, *supra*).

¹. Chapter. I, Section 130.340(a) of 86 Ill. Admin. Code provides that "... the Retailers' Occupation Tax does not apply to sales of tangible personal property to interstate carriers for hire for use as rolling stock moving in interstate commerce... ." Subsection (d) provides in essence that in order for the rolling stock to be moving in interstate commerce, it must transport, for hire, "... persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. ..." Therefore, the rolling stock exemption itself is explicative of the phrase "interstate commerce".

Exhibit 3 to the stipulation (Joint Ex. No. 1) consists of a list of the buses that were assessed by the Department. Exhibit 4 to the stipulation consists of trip tickets for the taxpayer's transportation of passengers across state lines or destined across state lines for the period of January 1, 1990 through December 31, 1992 for the buses listed therein. The trip tickets are summarized by bus number in exhibits 5 and 6 to the stipulation.

In reviewing said exhibits, it is clear that of the 32 buses at issue (exhibit 3), trip tickets were tendered for only 9 of those buses (exhibit 5). The number of trips across the state line and trips to the airport are given for each of these buses. However, nowhere is it stated how many total trips across the state line and trips to transportation terminals each particular bus took. It is therefore impossible to know the percentage of use for each bus at issue that traveled out of state and or to transportation terminals, such as airports.

For the majority of buses at issue, no documentary evidence pertaining to any trips of any nature was tendered by the taxpayer. There is only testimonial evidence from a witness for the taxpayer that 5 to 10 percent of the taxpayer's charter trips were interstate. Unsubstantiated by documentary evidence, this statement has no evidentiary value. (First National Leasing & Financial Corporation v. Zagel, *supra*).

Of the 9 buses for which trip tickets were presented, 7 took trips that consisted of traveling across the Illinois state line and returning the same day, as well as traveling to the airport to drop off or pick up passengers who were either leaving the state or returning to Illinois. Of those 7 buses, not one made a trip to an airport in each of the three years for which the trip tickets were made available (1990, 1991 and 1992). Furthermore, 2 of the 9 buses did not make any trips to an airport or other transportation facility.

The purpose of distinguishing the types of trips made by the buses is because there is a difference between trips wherein the vehicle takes passengers across the Illinois state line to a neighboring state and returns the same day (i.e., "same day trips"), and trips to airports, bus stations, or railroad terminals wherein the vehicle is dropping off passengers whose journeys terminate outside of Illinois, or picking up passengers whose journeys originated outside of

Illinois. The same day trips do not fit into the exemption as they can be construed as one continuous journey which arguably both begins and terminates in Illinois. Such a trip taken by a vehicle is not the equivalent of rolling stock moving in interstate commerce. However, the rolling stock exemption does apply to trips made by vehicles to and/or from transportation terminals within Illinois, as it can be assumed that the rolling stock is transporting, for hire, "persons whose journeys or property whose shipments originate or terminate outside Illinois." (35 ILCS 105/3-60).

Of course, even if a vehicle does make trips to and/or from transportation facilities, the exemption does not apply if there is not sufficient documentary evidence to examine. For example, in cases where a vehicle does not make any of these types of trips in some of the taxable years, and no evidence is tendered to compare the number of qualifying trips taken to all trips, it is not possible to accord the exemption. There is no law in Illinois, whether it be case, statutory or regulatory, that sets forth a threshold number of qualifying trips which must be met before the rolling stock exemption can be invoked. However, without information pertaining to the specific type of trips relative to the total number of trips taken by each bus, there is no way to confer exempt status on any bus, even if the facts revealed a diminimus number of trips to airports with passengers intending to leave this State. It must be kept in mind that Davidsmeyer provides daily school route transportation services for school district 59, as well as for a consolidated special education district. Its charter bus service is only part of its operations.

Note, also, that the audit period is from 1981 through 1992. Nonetheless, the taxpayer only tendered trip tickets for three years (1990, 1991, 1992) of the audit period. There is no documentary proof nor stipulated evidence of any trips by any of the buses other than for a three year period. The trip tickets that are de hors the taxable period (1993 and 1994) are of no probative value. In the case of Chicago and Illinois Midland Railway Company v. Department of Revenue, *supra*, the Court held that in order for the rolling stock exemption to apply, the interstate use of the stock must have occurred during the audit period.

In the case of First National Leasing & Financial Corporation v. Zagel, *supra*, the court opined that oral testimony concerning the taxpayer's interstate activities was insufficient to prove its claim of entitlement to the rolling stock exemption. The court denied the taxpayer the exemption due to the fact that it lacked documentary evidence to indicate the amount of eligible exempt interstate commerce in which it engaged. In a concurring opinion, Justice Green opined that the oral evidence elicited at the administrative hearing indicated that the equipment at issue crossed on an "infrequent and irregular basis". There was no bonafide risk of multistate taxation, and therefore, no commerce clause requisite for the apportionment of Use Tax to use in Illinois.

In the case at bar, the evidence presented is insufficient to determine the percentage of trips taken by each bus at issue with passengers in route across state lines, or to conclude that the trips taken by each bus were at all conducted on a fixed schedule or with any degree of regularity. Documentary evidence was presented for only 9 of the 32 buses at issue. Even that evidence is not complete in that there is no indication of the total number of trips taken by each bus. Furthermore, of those 9 buses, 2 never made any trips to an airport or other transportation facility. Of the 7 buses that did travel to and/or from airports, not one made a trip to an airport in each of the three years for which documents were given. It is impossible, therefore, to accord the repair parts the rolling stock exemption when the buses into which they were placed are not eligible for the same.

In order for the repair parts to be considered exempt, a determination would have to be made that the parts were used on buses which were exempt as rolling stock moving in interstate commerce. Furthermore, the part itself must be utilized in interstate commerce. It is of serious concern if the taxpayer claims the exemption at the time of purchase, but only uses the part, by happenstance, on vehicles that do not move as rolling stock until six months, eight months or one year after purchase. There is evidence, in fact, that parts not used right away upon purchase are put into inventory for later use. (Tr. p. 37). In the instant case, as none of the vehicles at issue qualify for the rolling stock exemption, the parts do not qualify either. Thus, there is no need to address this issue any further.

The intent behind the rolling stock exemption is the avoidance of multistate taxation. The case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) allows a state to impose a tax on interstate commerce under certain qualifying conditions. In enacting section 3-55 of the Use Tax Act (35 ILCS 105/3-55), the Illinois legislature was reiterating that in order to prevent actual or likely multistate taxation, certain situations are exempted from the application of tax. Herein, there is no suggestion that any other state was in a position to impose its own Use Tax on the rolling stock, nor is there any likelihood of multistate taxation due to the very limited utilization of the buses in other states. As sparse as they may be, given the facts of the case, it is highly improbable that another state could constitutionally impose a tax on the buses. Irregardless, the taxpayer presented no evidence that multistate taxation was actual or probable. (See, Complete Auto Transit, Inc. v. Brady, *supra*).

The taxpayer cites the case of Burlington Northern, Inc. v. Department of Revenue, 32 Ill.App.3d 166 (1st Dist. 1975), in support of its position that the rolling stock exemption is to be liberally construed in order to avoid placing any possible burden on interstate commerce. In Burlington Northern, the court was concerned with whether the imposition of state Use Tax upon the purchase of various transportation vehicles would unduly burden interstate commerce. The court could not find any legislative history or intent regarding the enactment of the rolling stock exemption, and therefore, utilized general principles of statutory construction in rejecting the "original intent and primary purpose" standard employed by the Department in determining whether the rolling stock exemption was applicable to the vehicles at issue. The court found that the application of this standard may make it administratively easier for the Department to decide whether the exemption applies, but it has no basis in statute or regulation, nor was it apparently within the contemplation of the legislature. The court, therefore, found that Burlington Northern's physical movement across state lines 13 percent of the time, combined with the

interstate movement accorded to said taxpayer as a carrier of interstate traffic, was sufficient to allow various transportation vehicles to qualify for the "rolling stock" exemption.²

The Burlington court seems to ignore the preamble to the exemptions set forth in section 3-55 of the Act, which provides that "[t]o prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances" This appears to stem from the court's determination that the Illinois legislature intended to exempt rolling stock moving in interstate commerce regardless of the potentiality of multiple taxation. Because the intent of the legislature is so clearly provided in the statute, I respectfully disagree with the Burlington court's determination that the preamble is meaningless and, therefore, merely superfluous. (*See, also*, Judge John A. Ward's findings in his Order of September 4, 1997 in National School Bus Service, Inc. v. Illinois Department of Revenue, 96 CH 13424).

The Burlington case is factually distinguishable from the instant case. The court in Burlington determined that the purchases of various types of equipment by the railroad company were excepted from Use Tax pursuant to the rolling stock exemption due to the intertwining of taxpayer's intrastate and interstate business. In finding passenger cars exempt, the court held that when considering Burlington's 13 percent of actual physical movement across state lines, combined with the interstate movement "conferred on" the railroad by reason of its transportation of interstate traffic consisting of mail and express packages, it can be concluded that Burlington's "interstate use and involvement is ... intertwined with its intrastate use... ." (32 Ill.App.3d 166, 176). The same reasoning was applied when finding switching engines to be exempt. That is, the railroad company's interstate use and involvement of the equipment was so intertwined with

² The taxpayer also cites the case of Time, Inc. v. Department of Revenue, 11 Ill.App.3d 282 (1st Dist. 1973), in validation of its position. In Time, Inc., the court concurred with the position of Time that a taxpayer need not prove that multistate taxation will occur if it is not granted an exemption set forth in 3-55 of the Use Tax Act (formerly section 439.3). Rather, the court determined that the sole requisite is for the taxpayer to prove that it satisfies the criterion as set forth in the statute, and therefore, qualifies for the exemption.

I find Time, Inc. to recite nothing more than what is already settled case law in Illinois. It is a basic tenet that the taxpayer carries the burden of proof when claiming an entitlement to exemption. (MacMurray College v. Wright, 38 Ill.2d 272 (1967)). Time, Inc. simply clarifies that the prefatory phrase, "[t]o prevent actual or likely multistate taxation ..." is a comment on the intent behind granting the exemption.

its intrastate use that to discontinue its intrastate business would in great measure negatively affect its interstate business.

The taxpayer takes issue with the fact that the Department assessed parts purchased prior to June 30, 1990, claiming that it is barred by the statute of limitations. The taxpayer avers that the Department's assessment goes back as far as 1981 for the reason that the taxpayer failed to file returns for the period at issue.³

At the time the Department issued the assessment at issue, Section 5 of the Retailers' Occupation Tax Act, incorporated by reference into the Use Tax Act via section 12 thereof, allowed the issuance of an assessment under certain circumstances back to July 1, 1981, well beyond the three and one-half year limitation period. (Sargent & Lundy v. Sweet, 207 Ill.App.3d 888 (1990)). The six year limitation period to which the taxpayer refers was not made law until almost a year after the Department's issuance of this assessment. (*See*, P.A. 88-660, eff. Sept. 16, 1994). Further, the taxpayer asserts that there was no "failure to file" on its part because there was no requirement for it to file a return. The only way the taxpayer can prove that it is entitled to an exemption on its purchases, however, is for it to have kept records that show it qualified for that exemption. Certainly, the taxpayer must also prove by documentary evidence that its purchases of fixed assets and consumable supplies are not taxable. The taxpayer, for the reasons stated above, has failed to do so.

In addition, the taxpayer takes issue with the fact that the Department's assessment was based upon a test period derived from records available for the period of 1990 and projected back to 1981 through May 11, 1984. The taxpayer's evidence credibly provides that prior to May 11, 1984, the taxpayer paid tax on its purchases of buses and bus parts since it did not possess a certificate of authority from the Interstate Commerce Commission, and therefore, did not consider itself eligible for the rolling stock exemption. On May 11, 1984, the Interstate

³. In stating its position in its post-hearing brief, the taxpayer assumes facts not in evidence. For example, the taxpayer asserts that it "showed that it purchases its parts in Illinois from an Illinois retailer who is required to and did file a monthly return on its receipts for the previous month,...". (Taxpayer's Hearing Brief, p. 31). The taxpayer also sets forth arguments that the Department allegedly made regarding when Use Tax returns are due to be filed. However, the record substantiates no such argument.

Commerce Commission granted the taxpayer a Certificate of Public Convenience and Necessity, at which point the taxpayer started to claim the exemption. In addition thereto, as the taxpayer presented substantial documentary evidence that its records for that period were destroyed by a flood, it could not prove tax payments for 1981 through 1984. Therefore, it is my determination that for the period of July 1, 1981 through May 1984 the taxpayer has presented sufficient evidence to rebut the Department's prima facie case of liability as it applies to the purchase of buses and bus parts. For this period, therefore, the NTL is reduced accordingly, as to these purchases.

As noted previously, when granting exemptions from tax, the burden is on the taxpayer to prove clearly and conclusively its entitlement thereto. Statutes which exempt property or entities from taxation must be strictly construed in favor of taxation and against exemption. (Wyndemere Retirement Community v. Department of Revenue, 274 Ill.App.3d 455 (2nd Dist. 1955)). In the case at bar, Davidsmeyer Bus Service, Inc. has failed to carry its burden of proof. It is therefore, my determination that the taxpayer is not entitled to the rolling stock exemption, and that Use Tax was properly assessed on the purchases of buses and parts for the period subsequent to May 1984. As no evidence was proffered regarding the assessment of fixed assets and consumable supplies, Use Tax was likewise properly assessed thereon.

RECOMMENDATION:

It is my recommendation that NTL No. SF 199328785401006 be affirmed, except as to that part of the assessment that relates to the purchase of buses and bus parts prior to May 1984.

Enter:

Administrative Law Judge

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	Case No. 94 ST 0010
)	IBT No. 1043-3244
v.)	
)	Administrative Law Judge
DAVIDSMEYER BUS SERVICE INC.))	Mary Gilhooly Japlon
Taxpayer)	

RECOMMENDATION FOR DISPOSITION

Appearances: Special Assistant Attorney General Richard A. Rohner, on behalf of the Department of Revenue of the State of Illinois; Collins & Collins, by Michael R. Collins, on behalf of Davidsmeyer Bus Service, Inc.

SYNOPSIS:

This matter comes on for hearing pursuant to the timely protest by Davidsmeyer Bus Service, Inc. (hereinafter "Davidsmeyer" or "taxpayer") of Notice of Tax Liability ("NTL") No. SF 199328785401006 issued by the Department of Revenue (hereinafter "Department") on October 15, 1993 in the amount of \$486,446.00 for Use Tax, penalty and interest due on the purchase of buses, bus parts, consumable supplies and fixed assets for the period of July 1, 1981 through December 31, 1992. The taxpayer filed a timely protest thereto.

At hearing, Mr. Richard D. Bingham testified on behalf of the taxpayer, and Ms. Gerise Ricard testified as an adverse witness for Davidsmeyer. Specifically at issue is whether the taxpayer is entitled to the "rolling stock" exemption of the Use Tax Act on its purchases of buses and repair parts for the buses, whether the Department properly assessed the taxpayer on its bus

repairs and maintenance, consumable supplies and fixed assets, and whether the assessment is barred by the statute of limitations for the period prior to June 30, 1990. The parties filed a Stipulations of Facts and Issues (Joint Ex. No. 1). Subsequent to the hearing, they filed memoranda of law in support of their respective positions.

Following the submission of all evidence and a review of the record and briefs filed herein, it is recommended that this matter be resolved in favor of the Department of Revenue.

FINDINGS OF FACT:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Correction of Returns, showing a total liability due and owing in the amount of \$230,132 for state Use Tax delinquencies, and penalty in the amount of \$65,467, for a total of \$295,599 for the period of July 1, 1981 through December 31, 1992. (Dept. Group Ex. No. 1; Tr. pp. 6-7).

2. On October 15, 1993 the Department issued Notice of Tax Liability No. SF 199328785401006 to the taxpayer. (Joint Ex. No. 1, par. 2, Ex. 2).

3. The tax liability period is July 1, 1981 through December 31, 1992. (Joint Ex. No. 1, par. 4, Ex. 2).

4. On December 6, 1993, the taxpayer filed a timely protest to the Notice of Tax Liability. (Joint Ex. No. 1, par. 3).

5. A Certificate of Public Convenience and Necessity was issued to the taxpayer by the Interstate Commerce Commission on May 11, 1984. (Joint Ex. No. 1, par. 1, Ex. 1).

6. The certificate authorized Davidsmeyer to transport passengers by bus in interstate commerce. (Joint Ex. No. 1, par. 1).

7. The taxpayer takes passengers to airports, and picks up passengers from airports. (Tr. p. 19).

8. The taxpayer documents its trips, both out of state and to and from airports, with trip tickets. (Tr. pp. 20-21).

9. The trip tickets also serve as invoices. (Tr. p. 23).

10. Charter trips conducted for school groups are also documented and invoiced via trip tickets. (Tr. p. 26).

11. The taxpayer advertised its services from 1988 until last year through a brochure stating that it is available for daily route services for school systems and intrastate and interstate charters. (Tr. pp. 29-31; Taxpayer's Ex. No. 1).

12. The taxpayer has a contract to provide daily route service with school district 59, and another contract to service a consolidated special education district. (Tr. p. 50).

13. Davidsmeyer maintains its own repair shop facility. (Tr. p. 37).

14. During the audit period, the taxpayer purchased parts in order to repair its own buses; it does not resell any of those parts to any outside parties. (Tr. p. 37).

15. If the parts purchased by the taxpayer are not used right away, they are put into inventory for later use. (Tr. p. 37).

16. Due to a flash flood on August 14, 1987, some of the taxpayer's business records were destroyed. (Tr. pp. 38-39; Joint Ex. No. 1, pars. 15, 16; Ex. Nos. 11, 12, 13).

17. As a result of the flooding and the destruction of certain records, the taxpayer was not able to produce invoices for consumable supplies, fixed assets and bus repairs and maintenance for the period prior to August 14, 1987. (Tr. p. 41; Joint Ex. No. 1, pars. 14, 15, Ex. 11).

18. Buses utilized for school routes are also used on charter trips, including out of state trips. (Tr. p. 44).

19. Prior to 1984, Davidsmeyer did not claim the rolling stock exemption on its purchases of buses and parts because it did not have a certificate of authority from the Interstate Commerce Commission. (Tr. pp. 44-45).

20. During the course of the revised audit, the Department did not investigate whether the retailer from whom Davidsmeyer purchased consumable supplies and fixed assets filed Use Tax returns. (Tr. p. 70; Joint Ex. No. 1, par. 13).

21. There were no invoices for purchases of bus parts for the period of 1981 through 1984, so the auditor took a sample of bus part purchases for the period of January 1990 through June 1990 and projected purchases for 1981 through 1992 based upon the sample. (Tr. pp. 65-66; Joint Ex. No. 1, par. 18(b)).

22. The taxpayer verbally agreed to the size of the sample. (Joint Ex. No. 1, par. 18(b)).

23. Regarding bus repairs and maintenance, the Department used the year 1990 to project liability for audit period. (Joint Ex. No. 1, par. 18(c)).

24. The year 1990 was chosen for the sample because the only other years for which information was available were 1991 and 1992. In 1990, repair expenses were less, and the least amount of expenses incurred in this period. (Joint Ex. No. 1, par. 18(c)).

25. During the period of July 1, 1990 through December 31, 1990, the taxpayer owned 118 buses. (Joint Ex. No. 1, par. 19).

26. During the period of July 1, 1991 through December 31, 1991, the taxpayer owned 118 buses. (Joint Ex. No. 1, par. 20).

27. During the period of July 1, 1992 through December 31, 1992, the taxpayer owned 118 buses. (Joint Ex. No. 1, par. 21).

28. Exhibit 4 to the stipulation consists of copies of trip tickets for the taxpayer's transportation of passengers across state lines, or destined across state lines for the period of January 1, 1990 through December 31, 1992 for the bus numbers depicted thereon. (Joint Ex. No. 1, par. 7, Ex. No. 4).

29. Exhibit 5 to the stipulation is a summary by bus of the trip tickets reflected in stipulation Ex. 4, with the exception of the unidentified buses at the bottom of page 14. (Joint Ex. No. 1, par. 8, Ex. No. 5).

30. Exhibit 6 to the stipulation identifies all but one of the unidentified buses on page 14 of Exhibit 5 to the stipulation. (Joint Ex. No. 1, par. 9, Ex. 6).

CONCLUSIONS OF LAW:

The Department prepared corrected returns for Use Tax liability pursuant to section 5 of the Retailers' Occupation Tax (hereinafter ROT) Act (35 ILCS 120/5). Said section is incorporated by reference in the Use Tax Act via section 12 thereof (35 ILCS 105/12). Section 5 of the ROT Act provides in pertinent part as follows:

In case any person engaged in the business of selling tangible personal property at retail fails to file a return, the Department shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination. ... Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy or computer print-out of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. ... Such certified reproduced copy or certified computer print-out shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein. (35 ILCS 120/5).

In the case at bar, the taxpayer is challenging the assessment by the Department of Use Tax, penalty and interest on the purchase of buses, repair parts for buses, fixed assets and consumable supplies. The taxpayer asserts that the bus and repair part purchases are exempt from Use Tax based upon the "rolling stock exemption" as set forth in sections 3-55 and 3-60 of the Use Tax Act as follows:

Sec. 3-55. Multistate exemption. To prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances:

(b) The use, in this State, of tangible personal property by an interstate carrier for hire as rolling stock moving in interstate commerce... . (35 ILCS 105/3-55).

Sec. 3-60. Rolling stock exemption. The rolling stock exemption applies to rolling stock used by an interstate carrier for hire, even just between points in Illinois, if the rolling stock transports for hire, persons whose journeys or property whose shipments originate or terminate outside Illinois. (35 ILCS 105/3-60).

To be considered an interstate carrier for hire, the taxpayer must either possess an Interstate Commerce Commission Certificate of Authority, an Illinois Commerce Commission Certificate of Authority, or be a carrier recognized by the Illinois Commerce Commission. (*See*, 86 Ill. Admin. Code ch. I, Sec. 130.340). In the instant case, the parties stipulated and provided evidentiary proof that the taxpayer received a grant of authority from the Interstate Commerce Commission to operate as an interstate carrier of passengers for hire in May 11, 1984. (Joint Ex. No. 1, par. 1, Ex. 1). Prior to said date, the taxpayer claims that it operated interstate, but paid tax on any purchases of buses and repair parts.

Regarding the requirement that the interstate carriers must be "for hire", the administrative rules provide that "[t]he term 'rolling stock' includes the transportation vehicles of any kind of interstate transportation company for hire (... bus line, ...)", but the exemption does not contemplate vehicles:

used by a person to transport its officers, employees, customers or others not for hire (even if they cross State lines) or to transport property which such person owns or is selling and delivering to customers (even if such transportation crosses State lines). 86 Ill. Admin. Code ch. I, Sec. 130.340(b).

In sum, the taxpayer must prove by documentary evidence that it is an interstate carrier for hire using rolling stock that transports persons or property moving in interstate commerce. The Certificate of Public Convenience and Necessity which was issued to the taxpayer by the Interstate Commerce Commission on May 11, 1984 is by itself not sufficient to prove that Davidsmeyer is an interstate carrier for hire. In First National Leasing & Financial Corporation v. Zagel, 80 Ill.App.3d 358, 360 (4th Dist. 1980), the Court specifically held that "... the certificate of temporary authority, by itself, is insufficient evidence of interstate activity." In the

case at bar, there was testimony regarding the taxpayer's adherence to the rules and regulations of the Interstate Commerce Commission. However, as the testimony in First National Leasing & Financial Corporation, *id.*, was not sufficient to prove interstate activity, testimony by the taxpayer's witness, likewise, is not adequate to establish that the taxpayer is an interstate carrier for hire. Rather, documentary evidence in the form of books and records is necessary.

I will consider the trip tickets tendered by the taxpayer as part of the stipulation exhibits as adequate substantiation of taxpayer's claim that it is an interstate carrier for hire, as the information thereon supports this assertion. However, the trip tickets in evidence as stipulation exhibit 4 pertain only to the years 1990, 1991 and 1992. There is no documentary evidence regarding the prior years of the audit period. As the taxpayer was granted authority to operate as an interstate carrier for hire by the Interstate Commerce Commission in May 1984, there is no evidence whatsoever for the period prior thereto. As the trip tickets for 1993 and 1994 (stipulation exhibits 8 and 9) are outside the audit period, they carry no probative value. The holding in Chicago and Illinois Midland Railway Company v. Department of Revenue, 66 Ill.App.3d 397 (1st Dist. 1978) is pertinent to this matter. The Court held in that case that in order for the rolling stock exemption to apply, the interstate use of the rolling stock must have occurred during the audit period.

Therefore, the taxpayer has not even established that it was an interstate carrier for hire for the taxable years 1984 through 1989. (Note, however, that as the taxpayer did not have a certificate of authority from the Interstate Commerce Commission, it asserts it did not claim the exemption for the period prior to 1984). However, for the sake of argument, I will assume that the taxpayer has satisfied this requisite. The taxpayer must next prove that the vehicles at issue are used as rolling stock moving in interstate commerce. That is, the taxpayer must show with competent evidence that its rolling stock (i.e., vehicles) transports, for hire, "persons whose journeys or property whose shipments originate or terminate outside Illinois" and therefore,

qualifies for the rolling stock exemption.¹ Furthermore, as both buses and repair parts are at issue herein, the taxpayer must also prove that the parts it purchased were incorporated into rolling stock that moved in interstate commerce.

Several questions arise, such as (1) what types of trips constitute interstate commerce and qualify for the rolling stock exemption; and (2) how much interstate movement is necessary for an otherwise qualifying taxpayer to be entitled to the exemption. The regulations pertaining to the statutes at issue do not directly address these questions, but do shed some light on the issues. 86 Ill. Admin. Code ch. I, Sec. 130.340 provides in relevant part as follows:

(c) The rolling stock exemption cannot be claimed by a purely intrastate carrier for hire as to any tangible personal property which it purchases because it does not meet the statutory tests of being an interstate carrier for hire.

(d) The exemption applies to vehicles used by an interstate carrier for hire, even just between points in Illinois, in transporting, for hire, persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. The exemption cannot be claimed for an interstate carrier's use of vehicles solely between points in Illinois where the journeys of the passengers or the shipments of property neither originate nor terminate outside Illinois.

It is important to note that there is a distinction between a vehicle traveling interstate, or across the state line, and "rolling stock moving in interstate commerce". The exemption is accorded to stock, carrying persons or property, the journeys of which originate or terminate outside Illinois. A state can tax the instrumentalities of interstate commerce, as long as two conditions are met: (1) an obvious nexus exists between the taxing state and the object(s) taxed; and (2) the tax is fairly apportioned, so that there is no unreasonable taxation. (First National Leasing & Financial Corp. v. Zagel, *supra*).

¹. Chapter. I, Section 130.340(a) of 86 Ill. Admin. Code provides that "... the Retailers' Occupation Tax does not apply to sales of tangible personal property to interstate carriers for hire for use as rolling stock moving in interstate commerce... ." Subsection (d) provides in essence that in order for the rolling stock to be moving in interstate commerce, it must transport, for hire, "... persons whose journeys or property whose shipments, originate or terminate outside Illinois on other carriers. ..." Therefore, the rolling stock exemption itself is explicative of the phrase "interstate commerce".

Exhibit 3 to the stipulation (Joint Ex. No. 1) consists of a list of the buses that were assessed by the Department. Exhibit 4 to the stipulation consists of trip tickets for the taxpayer's transportation of passengers across state lines or destined across state lines for the period of January 1, 1990 through December 31, 1992 for the buses listed therein. The trip tickets are summarized by bus number in exhibits 5 and 6 to the stipulation.

In reviewing said exhibits, it is clear that of the 32 buses at issue (exhibit 3), trip tickets were tendered for only 9 of those buses (exhibit 5). The number of trips across the state line and trips to the airport are given for each of these buses. However, nowhere is it stated how many total trips across the state line and trips to transportation terminals each particular bus took. It is therefore impossible to know the percentage of use for each bus at issue that traveled out of state and or to transportation terminals, such as airports.

For the majority of buses at issue, no documentary evidence pertaining to any trips of any nature was tendered by the taxpayer. There is only testimonial evidence from a witness for the taxpayer that 5 to 10 percent of the taxpayer's charter trips were interstate. Unsubstantiated by documentary evidence, this statement has no evidentiary value. (First National Leasing & Financial Corporation v. Zagel, *supra*).

Of the 9 buses for which trip tickets were presented, 7 took trips that consisted of traveling across the Illinois state line and returning the same day, as well as traveling to the airport to drop off or pick up passengers who were either leaving the state or returning to Illinois. Of those 7 buses, not one made a trip to an airport in each of the three years for which the trip tickets were made available (1990, 1991 and 1992). Furthermore, 2 of the 9 buses did not make any trips to an airport or other transportation facility.

The purpose of distinguishing the types of trips made by the buses is because there is a difference between trips wherein the vehicle takes passengers across the Illinois state line to a neighboring state and returns the same day (i.e., "same day trips"), and trips to airports, bus stations, or railroad terminals wherein the vehicle is dropping off passengers whose journeys terminate outside of Illinois, or picking up passengers whose journeys originated outside of

Illinois. The same day trips do not fit into the exemption as they can be construed as one continuous journey which arguably both begins and terminates in Illinois. Such a trip taken by a vehicle is not the equivalent of rolling stock moving in interstate commerce. However, the rolling stock exemption does apply to trips made by vehicles to and/or from transportation terminals within Illinois, as it can be assumed that the rolling stock is transporting, for hire, "persons whose journeys or property whose shipments originate or terminate outside Illinois." (35 ILCS 105/3-60).

Of course, even if a vehicle does make trips to and/or from transportation facilities, the exemption does not apply if there is not sufficient documentary evidence to examine. For example, in cases where a vehicle does not make any of these types of trips in some of the taxable years, and no evidence is tendered to compare the number of qualifying trips taken to all trips, it is not possible to accord the exemption. There is no law in Illinois, whether it be case, statutory or regulatory, that sets forth a threshold number of qualifying trips which must be met before the rolling stock exemption can be invoked. However, without information pertaining to the specific type of trips relative to the total number of trips taken by each bus, there is no way to confer exempt status on any bus, even if the facts revealed a diminimus number of trips to airports with passengers intending to leave this State. It must be kept in mind that Davidsmeyer provides daily school route transportation services for school district 59, as well as for a consolidated special education district. Its charter bus service is only part of its operations.

Note, also, that the audit period is from 1981 through 1992. Nonetheless, the taxpayer only tendered trip tickets for three years (1990, 1991, 1992) of the audit period. There is no documentary proof nor stipulated evidence of any trips by any of the buses other than for a three year period. The trip tickets that are dehors the taxable period (1993 and 1994) are of no probative value. In the case of Chicago and Illinois Midland Railway Company v. Department of Revenue, *supra*, the Court held that in order for the rolling stock exemption to apply, the interstate use of the stock must have occurred during the audit period.

In the case of First National Leasing & Financial Corporation v. Zagel, *supra*, the court opined that oral testimony concerning the taxpayer's interstate activities was insufficient to prove its claim of entitlement to the rolling stock exemption. The court denied the taxpayer the exemption due to the fact that it lacked documentary evidence to indicate the amount of eligible exempt interstate commerce in which it engaged. In a concurring opinion, Justice Green opined that the oral evidence elicited at the administrative hearing indicated that the equipment at issue crossed on an "infrequent and irregular basis". There was no bonafide risk of multistate taxation, and therefore, no commerce clause requisite for the apportionment of Use Tax to use in Illinois.

In the case at bar, the evidence presented is insufficient to determine the percentage of trips taken by each bus at issue with passengers in route across state lines, or to conclude that the trips taken by each bus were at all conducted on a fixed schedule or with any degree of regularity. Documentary evidence was presented for only 9 of the 32 buses at issue. Even that evidence is not complete in that there is no indication of the total number of trips taken by each bus. Furthermore, of those 9 buses, 2 never made any trips to an airport or other transportation facility. Of the 7 buses that did travel to and/or from airports, not one made a trip to an airport in each of the three years for which documents were given. It is impossible, therefore, to accord the repair parts the rolling stock exemption when the buses into which they were placed are not eligible for the same.

In order for the repair parts to be considered exempt, a determination would have to be made that the parts were used on buses which were exempt as rolling stock moving in interstate commerce. Furthermore, the part itself must be utilized in interstate commerce. It is of serious concern if the taxpayer claims the exemption at the time of purchase, but only uses the part, by happenstance, on vehicles that do not move as rolling stock until six months, eight months or one year after purchase. There is evidence, in fact, that parts not used right away upon purchase are put into inventory for later use. (Tr. p. 37). In the instant case, as none of the vehicles at issue qualify for the rolling stock exemption, the parts do not qualify either. Thus, there is no need to address this issue any further.

The intent behind the rolling stock exemption is the avoidance of multistate taxation. The case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) allows a state to impose a tax on interstate commerce under certain qualifying conditions. In enacting section 3-55 of the Use Tax Act (35 ILCS 105/3-55), the Illinois legislature was reiterating that in order to prevent actual or likely multistate taxation, certain situations are exempted from the application of tax. Herein, there is no suggestion that any other state was in a position to impose its own Use Tax on the rolling stock, nor is there any likelihood of multistate taxation due to the very limited utilization of the buses in other states. As sparse as they may be, given the facts of the case, it is highly improbable that another state could constitutionally impose a tax on the buses. Irregardless, the taxpayer presented no evidence that multistate taxation was actual or probable. (See, Complete Auto Transit, Inc. v. Brady, *supra*).

The taxpayer cites the case of Burlington Northern, Inc. v. Department of Revenue, 32 Ill.App.3d 166 (1st Dist. 1975), in support of its position that the rolling stock exemption is to be liberally construed in order to avoid placing any possible burden on interstate commerce. In Burlington Northern, the court was concerned with whether the imposition of state Use Tax upon the purchase of various transportation vehicles would unduly burden interstate commerce. The court could not find any legislative history or intent regarding the enactment of the rolling stock exemption, and therefore, utilized general principles of statutory construction in rejecting the "original intent and primary purpose" standard employed by the Department in determining whether the rolling stock exemption was applicable to the vehicles at issue. The court found that the application of this standard may make it administratively easier for the Department to decide whether the exemption applies, but it has no basis in statute or regulation, nor was it apparently within the contemplation of the legislature. The court, therefore, found that Burlington Northern's physical movement across state lines 13 percent of the time, combined with the

interstate movement accorded to said taxpayer as a carrier of interstate traffic, was sufficient to allow various transportation vehicles to qualify for the "rolling stock" exemption.²

The Burlington court seems to ignore the preamble to the exemptions set forth in section 3-55 of the Act, which provides that "[t]o prevent actual or likely multistate taxation, the tax imposed by this Act does not apply to the use of tangible personal property in this state under the following circumstances" This appears to stem from the court's determination that the Illinois legislature intended to exempt rolling stock moving in interstate commerce regardless of the potentiality of multiple taxation. Because the intent of the legislature is so clearly provided in the statute, I respectfully disagree with the Burlington court's determination that the preamble is meaningless and, therefore, merely superfluous. (*See, also*, Judge John A. Ward's findings in his Order of September 4, 1997 in National School Bus Service, Inc. v. Illinois Department of Revenue, 96 CH 13424).

The Burlington case is factually distinguishable from the instant case. The court in Burlington determined that the purchases of various types of equipment by the railroad company were excepted from Use Tax pursuant to the rolling stock exemption due to the intertwining of taxpayer's intrastate and interstate business. In finding passenger cars exempt, the court held that when considering Burlington's 13 percent of actual physical movement across state lines, combined with the interstate movement "conferred on" the railroad by reason of its transportation of interstate traffic consisting of mail and express packages, it can be concluded that Burlington's "interstate use and involvement is ... intertwined with its intrastate use... ." (32 Ill.App.3d 166, 176). The same reasoning was applied when finding switching engines to be exempt. That is, the railroad company's interstate use and involvement of the equipment was so intertwined with

² The taxpayer also cites the case of Time, Inc. v. Department of Revenue, 11 Ill.App.3d 282 (1st Dist. 1973), in validation of its position. In Time, Inc., the court concurred with the position of Time that a taxpayer need not prove that multistate taxation will occur if it is not granted an exemption set forth in 3-55 of the Use Tax Act (formerly section 439.3). Rather, the court determined that the sole requisite is for the taxpayer to prove that it satisfies the criterion as set forth in the statute, and therefore, qualifies for the exemption.

I find Time, Inc. to recite nothing more than what is already settled case law in Illinois. It is a basic tenet that the taxpayer carries the burden of proof when claiming an entitlement to exemption. (MacMurray College v. Wright, 38 Ill.2d 272 (1967)). Time, Inc. simply clarifies that the prefatory phrase, "[t]o prevent actual or likely multistate taxation ..." is a comment on the intent behind granting the exemption.

its intrastate use that to discontinue its intrastate business would in great measure negatively affect its interstate business.

The taxpayer takes issue with the fact that the Department assessed parts purchased prior to June 30, 1990, claiming that it is barred by the statute of limitations. The taxpayer avers that the Department's assessment goes back as far as 1981 for the reason that the taxpayer failed to file returns for the period at issue.³

At the time the Department issued the assessment at issue, Section 5 of the Retailers' Occupation Tax Act, incorporated by reference into the Use Tax Act via section 12 thereof, allowed the issuance of an assessment under certain circumstances back to July 1, 1981, well beyond the three and one-half year limitation period. (Sargent & Lundy v. Sweet, 207 Ill.App.3d 888 (1990)). The six year limitation period to which the taxpayer refers was not made law until almost a year after the Department's issuance of this assessment. (*See*, P.A. 88-660, eff. Sept. 16, 1994). Further, the taxpayer asserts that there was no "failure to file" on its part because there was no requirement for it to file a return. The only way the taxpayer can prove that it is entitled to an exemption on its purchases, however, is for it to have kept records that show it qualified for that exemption. Certainly, the taxpayer must also prove by documentary evidence that its purchases of fixed assets and consumable supplies are not taxable. The taxpayer, for the reasons stated above, has failed to do so.

In addition, the taxpayer takes issue with the fact that the Department's assessment was based upon a test period derived from records available for the period of 1990 and projected back to 1981 through May 11, 1984. The taxpayer's evidence credibly provides that prior to May 11, 1984, the taxpayer paid tax on its purchases of buses and bus parts since it did not possess a certificate of authority from the Interstate Commerce Commission, and therefore, did not consider itself eligible for the rolling stock exemption. On May 11, 1984, the Interstate

³. In stating its position in its post-hearing brief, the taxpayer assumes facts not in evidence. For example, the taxpayer asserts that it "showed that it purchases its parts in Illinois from an Illinois retailer who is required to and did file a monthly return on its receipts for the previous month,...". (Taxpayer's Hearing Brief, p. 31). The taxpayer also sets forth arguments that the Department allegedly made regarding when Use Tax returns are due to be filed. However, the record substantiates no such argument.

Commerce Commission granted the taxpayer a Certificate of Public Convenience and Necessity, at which point the taxpayer started to claim the exemption. In addition thereto, as the taxpayer presented substantial documentary evidence that its records for that period were destroyed by a flood, it could not prove tax payments for 1981 through 1984. Therefore, it is my determination that for the period of July 1, 1981 through May 1984 the taxpayer has presented sufficient evidence to rebut the Department's prima facie case of liability as it applies to the purchase of buses and bus parts. For this period, therefore, the NTL is reduced accordingly, as to these purchases.

As noted previously, when granting exemptions from tax, the burden is on the taxpayer to prove clearly and conclusively its entitlement thereto. Statutes which exempt property or entities from taxation must be strictly construed in favor of taxation and against exemption. (Wyndemere Retirement Community v. Department of Revenue, 274 Ill.App.3d 455 (2nd Dist. 1955)). In the case at bar, Davidsmeyer Bus Service, Inc. has failed to carry its burden of proof. It is therefore, my determination that the taxpayer is not entitled to the rolling stock exemption, and that Use Tax was properly assessed on the purchases of buses and parts for the period subsequent to May 1984. As no evidence was proffered regarding the assessment of fixed assets and consumable supplies, Use Tax was likewise properly assessed thereon.

RECOMMENDATION:

It is my recommendation that NTL No. SF 199328785401006 be affirmed, except as to that part of the assessment that relates to the purchase of buses and bus parts prior to May 1984.

Enter:

Administrative Law Judge